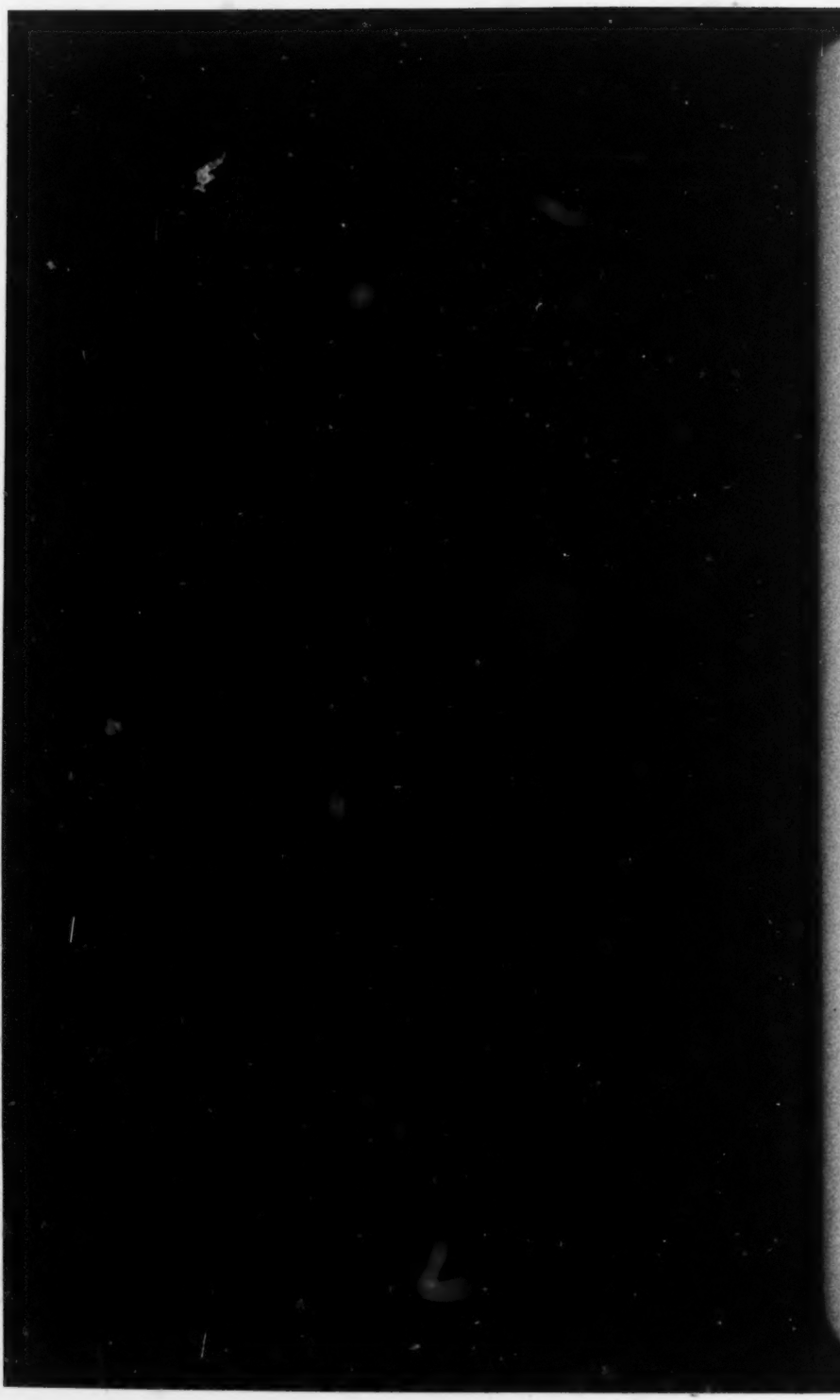

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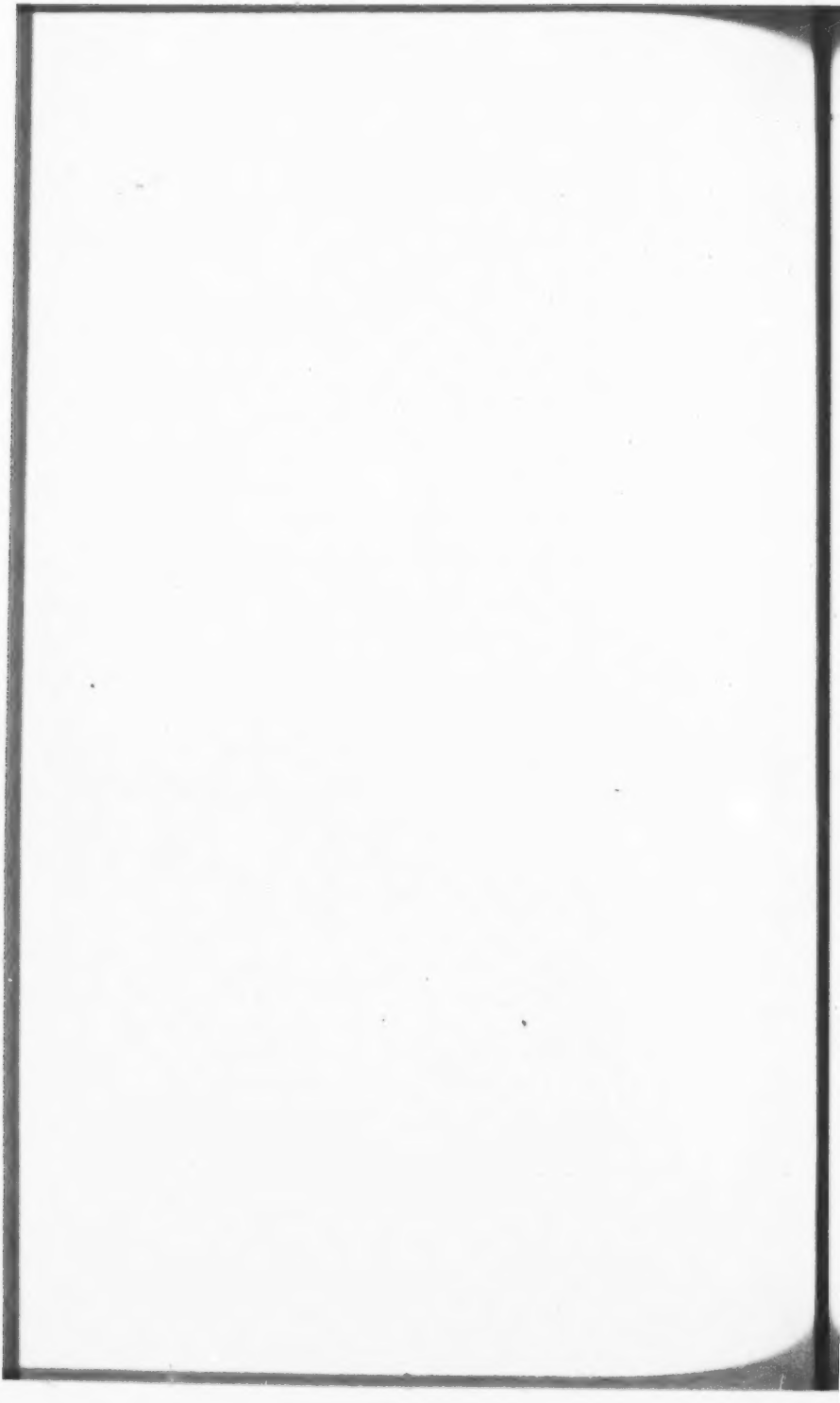

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 304

ELMER F. REMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3748–3777) is reported at 205 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778), and a petition for rehearing was denied June 30, 1953 (R. 3779). On July 17, 1953, by order of Mr. Justice Clark, the time for filing the petition for a writ of certiorari was extended to August 29, 1953. The

petition was filed August 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Petitioner was indicted for wilfully attempting to evade income taxes for the years 1944, 1945 and 1946. The proof of the Government that he had received income which he had not reported in his returns was based upon a computation of the annual increase in his net worth. He was convicted on four counts involving the years 1944 and 1945. The principal questions presented by the petition are:

1. Whether the evidence was sufficient to support the starting point of the Government's net worth computation.

2. Whether the evidence of the inadequacy of petitioner's books and records was sufficient to justify proof of his true net income by a net worth computation.

3. Whether, as to the third and fourth counts, the finding of guilt can be sustained, in view of the fact that the Government's net worth computation for the year 1945 includes $15,000 in "markers."

4. Whether the trial court correctly instructed the jury that, in determining whether certain of petitioner's business enterprises were partner-

ships, the important question was whether the ostensible partners actually intended in good faith to operate the businesses as partners.

5. Whether the trial court abused its discretion in denying petitioner's motions to inspect certain of his records held by the Government, in view of his prior opportunities to examine these records and the belated filing of the motions.

6. Whether petitioner made a sufficient prima facie showing of an improper outside contact by a juror to entitle him to a hearing on the alleged occurrence.

STATUTE AND RULES INVOLVED

Internal Revenue Code:

SEC. 41. *General rule.*

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep

books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 1946 ed., Sec. 41.)

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 16. *Discovery and Inspection*

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the

preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

* * * * *

Rule 17. *Subpoena*

* * * * *

(c) For Production of Documentary Evidence and of Objects

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

On April 9, 1951, an indictment in six counts was filed against petitioner in the United States District Court for the District of Nevada, charging violations of Section 145 (b) of the Internal Revenue Code. The first and second counts al-

leged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself and his wife for the year 1944 in the amount of $27,379.08. The third and fourth counts charged evasion of his own and his wife's income taxes for the year 1945 in the amount of $11,090.34. The fifth and sixth counts charged similar offenses for the year 1946. (R. 3–8.) After a jury trial lasting approximately three months, petitioner was convicted on the first four counts, the jury failing to agree as to the counts involving the year 1946. (R. 88, 3667.) On February 29, 1952, he was sentenced to imprisonment for five years and fined $5,000 on each of the first four counts. The terms of imprisonment were made to run concurrently, but the fines were cumulative. (R. 89–91.) The conviction was affirmed unanimously by the Court of Appeals for the Ninth Circuit. (R. 3748–3777.)

During the period involved in this case, petitioner had interests in a number of gambling houses. He also was interested in several bars, cafes, and liquor stores, most of which were located in the same neighborhood as, or even in the same building with, one of the gambling houses. These businesses were:

1. *Cal-Neva, Inc.*—This was an incorporated lodge located on the shore of Lake Tahoe, the dining room being on the California side of the state line and the gambling room on the Nevada side. As early as 1926 petitioner became associated

with Graham and McKay in the operation of this business. They contributed the original capital; he was the active manager. In 1946 he bought their interests for $466,666.66. (R. 1595, 1903–1911, 3243.)

2. *B-R Smoke Shoppe.*—This was a bookmaking establishment in San Francisco. In December 1941 petitioner bought it as a going concern. He supplied the purchase price ($2,500) and the initial bankroll ($7,500). No merchandise was sold, the cigar boxes in the front being dummies. Bets were accepted from all parts of the country. The business was ostensibly a partnership, with petitioner owning a half interest and Kyne and Lando owning the other half. (R. 1287–1291, 1345–1357, 1579.)

3. *110 Eddy Street.*—This was a bar located in San Francisco. In 1942 the proprietor owed petitioner more than $4,000 and petitioner took the establishment over and spent a considerable sum in improvements in order to protect his money. The business was ostensibly a partnership in which petitioner, Kyne, Cavani and Turner held equal shares. (R. 1382–1386, 1398–1399, 2076.)

4. *186 Club.*—This was an incorporated clubroom located at 186 Eddy Street in San Francisco. It was devoted to draw poker and operated twenty-four hours a day with three eight hour shifts. In the front of the building was a cigar, liquor and magazine store called the *Day-Night Cigar and Liquor Store.* In March 1943 the whole

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establishment was purchased as a going concern, with about $6,000 furnished by petitioner and $16,000 furnished by Nealis and Kopstick, who were in turn bought out at the end of the year. The officers of the corporate club were Busterna, Casselini, Kyne and Lando. There were no officers' or directors' meetings. The liquor store was an ostensible partnership in which petitioner, Kyne and Lando held equal shares. (R. 643–647, 1302–1317, 1424–1429, 1451, 1973, 1981, 3556, 3569, 3575.)

5. *San Diego Social Club.*—This was a gambling casino located in El Cerrito, California. Across the front of the building was a restaurant and bar known as the *21 Club.* (R. 791.) Petitioner bought the business in April or May 1943, concealing his ownership because there was opposition to his operation of a gambling venture at that location. (R. 742–743, 1109, 1128.) He held a half interest in the combined business of the two clubs; Pechart and Kessel held the other half. (R. 1110.) He took no active part in the operation, but seems to have dictated the choice of key employees. (R. 1153–1160.) When Pechart and Kessel opened another club across the street they gave him a "friendship bonus" because of his opposition. (R. 1117–1118, 1143.)

6. *Menlo Club.*—This was a gambling house in San Francisco. Like the *186 Club,* it remained open twenty-four hours a day with three eight hour shifts. It was operated in conjunction with

a bar and a restaurant known as *Tiny's Bar* and *Tiny's Restaurant.*[1] In April 1945 petitioner contracted to buy all three businesses for $175,000 and took a ten year lease on the premises at a total rent of $219,000. Thereafter it was operated by an ostensible partnership in which petitioner held 40% and Kyne, 15%. The other partners were Dito, Nelson, Maundrell, Fricker, and Turner. (R. 768–775, 1400–1410, 3576–3579.)

7. *Transit Smoke Shop.*—This was a combined gambling house, cigar and liquor store located in San Francisco. It was acquired in November 1946 for about $32,000, the money being supplied by petitioner. It was an ostensible partnership in which Partee held 50%, and petitioner and Kyne each held 25%. Partee put up no funds of his own. Kyne borrowed about $16,000 from the Menlo Club account to pay for his share and put this money into a safety deposit box which was used as a general depositary for the funds of all the San Francisco enterprises. (R. 1183–1193, 1474–1478, 1495–1496, 1523, 1566.)

8. *50–52 Mason Street.*—The *B–R Smoke Shoppe* was located at 50 Mason Street in San Francisco. During 1944, 1945 and 1946 close to $10,000 was spent in remodeling the front of this building into a private office for petitioner and general offices for all the San Francisco enterprises. The im-

[1] These are also referred to in the record as the "Menlo Bar" and "Tiny's Waffle Shop."

provements were paid for with funds drawn from the *Menlo Club* account. (R. 1662–1668, 1680–1681, 1694–1699, 2513–2518, 2660–2673.) The building at 52 Mason Street was rented as a warehouse for whiskey. (R. 1481.) Kyne acted as general manager of all the San Francisco enterprises. He visited them each day, picked up the receipts and gambling records, and brought them to 50 Mason Street. (R. 1396, 1411–1413, 1430–1432, 1436–1437, 1452, 1477, 1557–1558.)

The Motions under Rules 16 and 17.—As early as the first half of 1946 Internal Revenue agents began an investigation of the income tax returns of the *B–R Smoke Shoppe.* (R. 2115, 2123, 2152, 2163.) In the latter part of 1946 a special agent, whose duty it was to investigate possible criminal tax evasion, was assigned to the case, and by July 1947 the agents were examining the returns of petitioner and of all the above-named enterprises. (R. 1249, 2423, 2454–2458.) The agents had numerous interviews during 1946 and 1947 with Kyne and with the two bookkeepers, Slater and Maundrell. Kyne, Slater, and Maundrell gave considerable oral information and turned over, freely and voluntarily, a large quantity of records. The agents took these to their own offices for study, promising that they would be returned when the investigation was complete and that Kyne and Maundrell could have access to them in the meanwhile. On several occasions

Kyne and Maundrell obtained some of the records and then brought them back to the agents. (R. 1528–1530, 1640–1641, 1813–1815, 2123–2126, 2154–2155, 2165–2166, 2199–2200, 2449–2451, 2695–2698, 2783.)

The agents repeatedly pointed out to Kyne that the records of the enterprises were inadequate in many respects, but Kyne could not enlighten them. They sought permission to examine the contents of the safety deposit boxes, but this was refused by Kyne. Finally, at the agents' request, Kyne arranged an interview with petitioner on April 8, 1948, in the office of petitioner's then attorney, Thatcher. Thatcher asked whether the agents had any specific charges and whether they intended to recommend criminal prosecution, and when they would not commit themselves, he instructed petitioner not to answer any questions and terminated the interview. Thereafter, Thatcher, of his own accord, turned over further records of petitioner to the agents. The agents were never able to communicate with petitioner himself during the course of the investigation. (R. 2496, 2558–2572, 3045.) The special agent did not complete his investigation and submit his report recommending criminal prosecution until November 10, 1949. (R. 2577.)

Meanwhile, however, the Bureau of Internal Revenue had begun a civil proceeding for recovery of income taxes, and had issued 90-day letters alleging an understatement of net income for

1944, 1945, and 1946 in the approximate amount of $487,000 and specifying the businesses from which this arose. (R. 30–32.) A jeopardy assessment was levied against petitioner's assets in March 1949. (R. 3059.) On June 2, 1949, Lawrence Semenza, a certified public accountant, filed a power of attorney with the Treasury Department authorizing him to represent petitioner. (R. 37, 909–910.) On July 11, 1949, Semenza, at his request, was taken into a room where the agents were keeping the records which had been turned over to them; he was told he could take away anything he wanted; he selected those which he thought were pertinent to petitioner's civil liability for underpayment of taxes; and he signed a receipt and agreed to return the records to the agents. (R. 39, 901, 908–910, 919–920, 922.)

On February 14, 1950, petitioner was officially notified by the Bureau of Internal Revenue that criminal proceedings were being contemplated. (R. 3210.) In March he employed two of the attorneys who represented him at the trial, Messrs. Golden and Gillen, together with a second certified public accountant, Friedman. (R. 37.) There was a conference on May 25, 1950, at which petitioner's representatives were informed that if they prepared a net worth statement they would be allowed to compare it with the one already prepared by the Bureau. (R. 38–39.) Friedman was allowed to see all the records remaining in the hands of the agents; he

spent about a week examining them and was allowed to take some of them. (R. 39, 184–185, 3212–3213.) Furthermore, petitioner's attorneys instructed Semenza to turn over to Friedman all records pertaining to the San Francisco enterprises. (R. 910.) In November 1950 Friedman withdrew from the case and left all the records in the hands of petitioner's attorneys (R. 910, 3224.) Shortly before the case was presented to the grand jury in April 1951, Semenza was asked by the agents to return the records in accordance with this agreement. (R. 911.) Petitioner's attorneys refused to give them up on the ground that they were petitioner's property. (R. 173–176.) The indictment was returned on April 9, 1951, and trial was set for November 7, 1951. (R. 8, 447.)

The trial date was postponed to November 28, 1951, because the judge was engaged in other matters. (R. 180.) Meanwhile, the records which had been given by Friedman to petitioner's attorneys were returned to Semenza. (R. 912.) On October 22, 1951, defense counsel asked the prosecutor, Mr. Campbell, that they be allowed to examine the other records which still remained in the agents' hands. (R. 26–28.) The prosecutor agreed to do this, provided a showing was made of petitioner's interest in the records, and provided the written consent of the parties who had turned them over to the Government was obtained. (R. 40–41.) On November 14, 1951, peti-

tioner filed a *motion under Rule 16,* Federal Rules of Criminal Procedure, to inspect and take copies of the records in the Government's possession. It was explained that a tremendous amount of accounting work would be required to prepare for trial and that petitioner had been without an accountant until he obtained the services of Semenza in September 1951.[2] A continuance of the trial was requested until April. (R. 16–34.) After a hearing (R. 157–198), the court denied the motion to inspect on the ground that petitioner had had ample opportunity, through Friedman, to inspect all records in the Government's possession (R. 194–198).

On November 27, 1951, the day before the trial, petitioner presented a *motion under Rule 17,* Federal Rules of Criminal Procedure, for production and inspection of the records in the Government's possession, together with a subpoena to produce the records. (R. 42–54.) After a hearing (R. 241–288), the subpoena was quashed and the motion was denied on the ground that, under the circumstances, it was unreasonable to delay making it until the day before the trial (R. 286–287). The court assured defense counsel that they would be allowed ample time during the trial

[2] Semenza had been accountant for Cal-Neva, Inc., since 1931. (R. 1600, 3243.) He had some connection with the present case as early as April 1948. (R. 926, 931.) The records were turned over to him on July 11, 1949. (R. 901.)

to examine each document offered by the Government. (R. 287–288.)

A subpoena was issued to Semenza to produce the records in his possession, but he appeared at the trial and stated that they had again been taken by petitioner's attorneys. The court ordered them turned over to the clerk, and they were made available to both sides for the duration of the trial. (R. 912–929.) As to the records in the Government's possession, specific documents were promptly produced during the trial when requested by the defense. (R. 2008, 2020, 3182, 3470–3473.)

The Evidence.—The evidence to support the verdict may very briefly be summarized as follows:

There was evidence to warrant the conclusion that the so-called partnerships were actually sole proprietorships of petitioner. He supplied the funds to acquire and operate them. (R. 1290, 1348; 1313, 1456; 1383–1384, 1394; 1650–1651, 3582–3583.) The partnership agreements, typified by that with Kyne in the *Menlo Club,* expressly provided that the ostensible partner should not acquire an actual interest in the business until petitioner had been paid back in full from the profits. (R. 1514–1515, 1521, 3582–3583.) The profits were not actually distributed to anyone other than petitioner during the years involved, although the alleged partners were

given credit for distributable shares and their taxes on such shares were paid by the enterprises. (R. 1313, 1315, 1340, 1386, 1391, 1495, 1516, 1707, 1856, 1860–1861, 2073, 2102–2103, 2292–2293.) Lando had nothing to say about the policy of the *B–R Smoke Shoppe* and was not called on to make up losses in a bad year. (R. 1293, 1329–1330, 1342.) Cavani and Turner were employees at *110 Eddy Street*. (R. 2107, 3588.) Kyne admitted that he paid taxes on profits from *110 Eddy Street* and the *Day-Night Cigar Store* which he did not receive. (R. 1386–1390, 1539.) All the San Francisco enterprises had a common headquarters at *50 Mason Street* (R. 1481, 1535, 1680) and were financed from a common fund which consisted of profits from the various enterprises as well as money petitioner had acquired from other sources (R. 1412, 1484, 1496, 1539, 1544–1545).

There was evidence that the records of some of the enterprises, particularly the gambling houses, were entirely inadequate. Special Agent Weaver, who had been in charge of the investigation, qualified as an expert and testified that the records were not adequately kept. (R. 2453–2461, 2564, 2715.) The *Menlo Club* books did not show liabilities or disbursements; there were no records for 1945; the bank accounts could not be reconciled with the poker sheets; a trial balance could not be drawn from the books and records alone. (R. 2492–2494, 2519, 2766, 2795–2797,

2815–2816.) The books of the *B–R Smoke Shoppe* contained only one entry a day whether it was a win or a loss, and the figure represented a net after all expenses and salaries had been paid. (R. 1349, 1358.) A somewhat similar situation was found in the *186 Club*. (R. 2382, 2403–2404.) The books of the *San Diego Social Club* and the *21 Club* had been turned over to petitioner prior to trial and were not available. (R. 1102–1103.) The examining revenue agent never saw any books for the *San Diego Social Club*. (R. 1275.) The daily records of the gambling houses were systematically destroyed. (R. 1966, 2380, 2628.)

In view of this inadequacy of the records the Government determined petitioner's correct income for the period in question by computing the yearly increases in his net worth. The starting point date for this computation was December 31, 1943. Special Agent Weaver described the widespread and exhaustive investigation undertaken to determine petitioner's assets as of that date. (R. 2458–2465, 2534–2547, 2558–2559, 2566–2567, 2801–2802.) The Government credited petitioner with the full net worth of the *B–R Smoke Shoppe,* the *Day-Night Cigar Store,* and the bar at *110 Eddy Street,* on the ground that these were sole proprietorships instead of partnerships. Aside from these three items, and two other immaterial omissions, the Government's schedule of assets and liabilities was the same as that submitted by peti-

tioner. (Compare Ex. 183, R. 3612–3613, with Ex. M–1, R. 3626–3628.) The agents were unable to determine the amount of cash in safety deposit Box 48 in the Day and Night Branch of the Bank of America, which box was used as a depository for the funds of all the petitioner's enterprises.[3] As noted above, the agents could not talk to petitioner; they were refused access to the box by Kyne; and they were told by Kyne that he had no recollection of the amounts in the box at any particular time and that the only record left was no longer available. (R. 1559, 2559–2560, 2566–2567, 2572.) Consequently, the Government's computation shows a question mark for this item. However, the evidence showed that the only income tax returns filed by petitioner prior to 1944 were for the years 1934, 1942, and 1943 (R. 567–568); that in 1937 he was unable to pay an income tax and penalty of $178.10 due for 1934 (R. 2849–2852); that during his employment by *Cal-Neva, Inc.*, beginning in 1930, he received no salary and only one dividend which he lost by gambling (R. 1912, 2850); that an $1,800 judgment obtained

[3] A second safety deposit box held on December 31, 1943, was used for overnight storage of the *B–R Smoke Shoppe* bank roll, of which a record was available, and sometimes as much as $700 in addition. (R. 1369, 1373–1374, 1939–1942; cf. 1357–1360, 1537.) A third box was not acquired until later. (R. 1369–1370, 1536.) The safe at *110 Eddy Street* was used only to keep the previous day's receipts overnight. (R. 1536, 2076, 2096–2097.) The safe in the main office at *50–52 Mason Street* was not acquired until 1944. (R. 1709–1711, 2515, 3607–3608.)

against him in 1938 was still outstanding in 1945 (R. 1282–1285); that he was still in debt to his brother at the end of 1943, although the brother had written off one amount as a bad debt at the end of 1942 (R. 2992, 3395); that he was expanding his interests rapidly during 1941, 1942, and 1943 by investing cash in the *B–R Smoke Shoppe, 110 Eddy Street,* the *186 Club,* and the *San Diego Social Club* (*supra,* pp. 7–8); and that most of the money used to purchase the *186 Club* was, in effect, borrowed from Nealis and Kopstick (R. 1425–1428). The only evidence of the amount of cash in Box 48 at the end of 1943[4] was Kyne's testimony that the amount there varied from day to day, sometimes being considerable and sometimes less (R. 1536), and that about $17,700 was placed in the box on December 3, 1943 (R. 1483–1484). However, the money in the box was used as needed in the various enterprises, particularly to purchase cashiers' checks to pay lay-off bets of the *B–R Smoke Shoppe,* and during that month of December cashiers' checks in excess of $20,000 were purchased. (R. 1416–1423, 1484; Ex. 116.)

In the Government's computation, the amount of federal income taxes paid was added to the increase in net worth in order to determine peti-

[4] Petitioner offered no evidence on the point, but contented himself with arguing that the Government's net worth proof was unreliable because it had failed to establish accurately the amount of cash in the box. (R. 2942–2984.)

tioner's true net income. Nothing was charged against petitioner for non-deductible living expenses, although the evidence clearly indicated that these were considerable. (Cf. R. 2923–2939.) For 1944 the computation showed a net income of $50,747.91, of which $31,747.91 was unreported. For 1945, the net income was $71,065.40, of which $11,747.04 was unreported. (Ex. 183, R. 3612–3613.)

The Motion for New Trial.—The jury's verdict was returned on February 22, 1952, and on February 29 a motion for a new trial was filed, together with an affidavit of defense counsel. (R. 106–120.) The affidavit alleged that on February 23 counsel had learned, through newspaper articles, of a probable attempt to influence a juror during the trial. No affidavits of anyone having first-hand knowledge of the incident were presented, but the newspaper articles attached to the affidavit of counsel reported that during the trial one of the jurors, an insurance and real estate man, was visited by one of his former clients who worked in a Reno gambling casino; that during their conversation the former client made a remark to the effect that the juror could get a lot of money out of the trial through the defense; that the juror told the judge that he thought the former client was kidding but, in view of the judge's admonitions not to discuss the case, had decided to report the incident; that the judge

informed the prosecution, but not the defense, and had the Reno office of the FBI check on the story; that the FBI report confirmed the judge's belief that the remark was not meant seriously; that the judge had stated that the incident turned out to be harmless but, if there had been anything to it and the defense had been informed, it would have stifled the investigation. (R. 111–120.)

The motion asked that there be a trial to investigate the matter fully and to determine to what extent it had any effect on the jury and was prejudicial to the defendant, and that subpoenas be issued for the attendance at such trial, as witnesses, of the jurors, trial judge, members of the United States Attorney's office and other prosecuting counsel, the agents of the FBI, the person who communicated with the juror and others who participated in the incident. (R. 109–110.) When the motion for a new trial came on for argument, defense counsel in effect stated that he did not care to argue it (R. 93–94) and the motion was denied (R. 94, 120).

ARGUMENT

1. Petitioner contends (Pet. 17–21) that the Government's net worth computation failed to account for the amount of cash he had on hand at the starting point, December 31, 1943; that the computation is, therefore, meaningless as a measure of his net income for 1944 and 1945; and

that, accordingly, the case should not have been permitted to go to the jury. The argument is without merit.

The ultimate question here is whether a reasonable mind could conclude that there was, beyond a reasonable doubt, no such amount of cash in safety deposit Box 48[5] on December 31, 1943, as would throw the Government's net worth computation substantially out of line. If so, the case was a proper one for the jury. Here, the Government made an exhaustive investigation from New York to Honolulu and over a period extending back to 1930. It was determined that petitioner was "broke" in 1937 and still had debts at the end of 1943. Furthermore, during 1941, 1942, and 1943 he had been rapidly sinking cash into the foundations of his gambling empire, and had borrowed $16,000 from Nealis and Kopstick in the process. See also *supra,* pp. 18–19. Neither petitioner nor Kyne would give the agents any explanation of the amount in the box, and this, of course, is an element a reasonable mind could and would consider. *Bell* v. *United States,* 185 F. 2d 302, 309 (C. A. 4th), certiorari denied, 340 U. S. 930. Indeed, the only affirmative evidence of its contents is Kyne's testimony that about $17,000 was placed there December 3, 1943; but

[5] Petitioner mistakenly implies (Pet. 19–20) that the contents of the two safes are also material here. (See fn. 3, *supra,* p. 18.)

even if this amount were added to petitioner's net worth at the end of 1943, the Government's computation would still show unreported income in excess of $14,000 for 1944.

It would seem without dispute that a reasonable mind could fairly have concluded beyond a reasonable doubt that the amount in the box at the end of 1943 was immaterial, so far as the Government's net worth computation was concerned. The case was, therefore, properly submitted to the jury. *Curley* v. *United States,* 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C. A. 9th), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States,* 183 F. 2d 391 (C. A. 9th), certiorari denied, 340 U. S. 864. As the Court of Appeals said in its opinion (R. 3765):

> If a defendant could prevent a case of this type from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated. Skillful concealment cannot be made an invincible barrier to proof. *United States* v. *Johnson* [319 U. S. 503], at 518.

Here, where the probative force of the Government's evidence has the support of both courts

below and of the jury, there is no occasion for further review by this Court. Cf. *United States* v. *Johnson*, 319 U. S. 503, 518.

Nor is there any direct conflict on this point with either *Bryan* v. *United States*, 175 F. 2d 223 (C. A. 5),[6] or *United States* v. *Fenwick*, 177 F. 2d 488 (C. A. 7). In each of these cases there was a defective investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226; 177 F. 2d at 491. But here the agents' investigation was as complete as it could be, and, though barred from direct information as to one asset by petitioner himself, they were able to develop enough evidence to negative the probability of any considerable accumulation of cash.

2. Petitioner contends (Pet. 21–23) that it was error to permit the Government to determine his net income for the years in question by computing the annual increases in the net worth of all his enterprises. He argues that Section 41 of the Internal Revenue Code (*supra*, pp. 3–4) permits the Government to determine net taxable income by computing the annual increase in net worth only in the case where the "method of accounting" employed by the taxpayer does not clearly reflect

[6] Affirmed without consideration of this point when Bryan himself petitioned for a writ of certiorari from the refusal of the Court of Appeals to order the District Court to enter a judgment of acquittal instead of an order for a new trial, *Bryan* v. *United States*, 338 U. S. 552.

his income; that the evidence in this case established clearly inadequate books only in respect of the *B-R Smoke Shoppe;* that the errors in the books of the other enterprises "amounted to no more than normal accounting errors"; and that, therefore, a net worth computation was not permissible as to these other enterprises. There is no merit in this contention.

In the first place, assuming *arguendo* that Section 41 has any application to criminal cases,[7] neither the trial court nor the Court of Appeals was asked to make any such distinction between the *B-R Smoke Shoppe* and the other enterprises. To the contrary, the Government's net worth computation was objected to, and a directed verdict was requested, on the ground that, since the Government still retained some of petitioner's books and records, it should not be heard to say that the books of any of the enterprises were inadequate. (R. 2910–2916, 3465–3492; see also

[7] The Government does not concede this. Criminal evasion of income taxes may be established by circumstantial evidence, and the circumstantial evidence provided by a solidly based net worth computation may be sufficient, in itself, to establish guilt, even though the taxpayer's method of accounting appears, on the face of his books, to reflect clearly his income. The civil case cited by petitioner, *United States* v. *American Can Co.*, 280 U. S. 412, has nothing to do with net worth computations, which are, as the petitioner points out (Pet. 23), only approximations of net income. That case discusses "general methods of bookkeeping" (280 U. S., at 419), *i. e.*, cash and accrual "methods of accounting".

R. 515–538, 2856, 2861.) And this was the theory of the requested instructions. (R. 79–87.) Secondly, the record is replete with evidence that the books of the gambling enterprises were utterly inadequate to reflect income. The books of the *B-R Smoke Shoppe* had only one entry a day representing profit or loss after all expenses; much the same situation prevailed at the *186 Club;* the *San Diego Social Club* apparently had no records (R. 1275); daily records were systematically destroyed (R. 1966, 2380, 2628); the *Menlo Club* had no records for 1945, and for 1946 the daily receipts could not be reconciled with the bank accounts (R. 2794–2797).

The objection which petitioner did raise in the trial court, and which appears as a subsidiary argument in the petition (Pet. 23), that the proof of inadequacy was insufficient because all of the books and records were not in evidence, is patently insubstantial. The Government made a clear prima facie showing of the inadequacy of the records which petitioner was unable to rebut. In rejecting the motion for acquittal (R. 3469–3475), the trial court said (R. 3473):

> If you had pointed out during the course of the trial any specific book or record, I would have been inclined to consider with some thought the request, but there has been no request for any specific book or record and I believe the records of these different enterprises were kept with the

knowledge of the defendant or his agents and if there was any record anywhere that would have been of service to the defendant in this case, they would have been able to point it out and ask the Court to have it produced and that wasn't done at any time in the course of this trial or in any proceeding prior to this trial.

3. In the 1945 net worth computation for the *B–R Smoke Shoppe* (R. 3601) the Government included a bank roll of $20,000. The witness Fritchitt had testified that $15,000 of this sum was "markers". (R. 1949, 1962, 1968.) Petitioner contends (Pet. 23–26) that the "markers" were accounts receivable; that they should have been excluded from the computation, since the *B–R Smoke Shoppe* was on a cash, not an accrual, basis; and that, since the Government's computation showed unreported income of only $11,747.04 for 1945, the conviction on the third and fourth counts has no substantial basis. It should be noted that this argument can affect only the fine, since the general prison sentence of five years would still be supported by either of the first two counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642.

These "markers" were of two kinds. Some were deposited in the bank roll by petitioner and his associates when they withdrew cash from it. (R. 1298–1300, 1374–1375.) Others were IOU's

from bettors who had lost. (R. 1360–1362, 1962.) Petitioner's argument is directed against "markers" of the latter type, since the former were obviously loans. (Pet. 25.) There is no direct evidence as to the proportion of either type contained in the $15,000 collection at the end of 1945, for Fritchitt made no distinction. (R. 1949, 1961, 1962, 1965, 1968.) But the jury could have inferred that the amount of bettors' "markers" was smaller, since there appear to have been a comparatively small amount of this type outstanding at the end of 1943 (R. 1360–1362), and since the business was closed for a large part of 1945 (R. 1297–1299, 1939). Furthermore, there was evidence in the record that bettors' "markers" were treated as cash assets (R. 1298–1300, 1375), and the Government's expert, Weaver, testified at length that they were in the nature of cash advances to bettors[8] (R. 2619–2626, 2722–2724, 2772–2782). Finally, it should be noted that, although the Government included no living expenses in its net worth computation (R. 3612–3613), it was actually proved that petitioner spent approximately $4,300 during 1945 for such items as clothing, jewelry and hotel bills (R. 586, 615, 619, 824, 843, 986, 1202–1204, 1212). In view of the nec-

[8] The accounts of a betting commissioner, representing the commissions he earns for acting as intermediary between bettor and taker, are of a different nature. See *Goldbaum* v. *United States*, No. 164, this Term, certiorari denied, October 12, 1953.

essary conclusion that he must have spent some substantial additional sum for ordinary living expenses, the jury would be warranted in finding a substantial understatement of income for 1945 even though the "markers" were excluded from consideration.

4. Petitioner contends (Pet. 16, 26–31) that the courts below erred in applying the rule of *Commissioner* v. *Culbertson,* 337 U. S. 733. That case holds that the test for recognition of a partnership for income tax purposes is the good faith intent of the partners. We find difficulty in understanding the basis of petitioner's present complaint, since this is exactly the test which he himself proposed to the trial court. Defendant's Requested Instruction No. 111 (R. 83–84), after describing in some detail the alleged agreements between petitioner and his associates, concludes with the following paragraph:

> Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates *did not intend to operate* said businesses *as profit-sharing partners,* you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year. [Emphasis supplied.]

The trial court, while refusing to go into the specific details, gave what was, in effect, the same instruction. (R. 142, 143–144.) Petitioner ob-

jected to the refusal to give his requested instruction (R. 3495–3496), and in the Court of Appeals he simply argued that the charge as given was too general and that the trial court should have told the jury that the particular agreements in this case *could* have been partnerships, if so intended.

Moreover, the vice of the present contention rests in its confusion of two distinct issues, the bona fide intent to form a partnership and the wilfull intent to evade payment of income taxes. It may well be that associates frankly and openly enter into an agreement in which their intent, though insufficient to create partnership status, has no tinge of criminal evasion. Here, the jury was instructed on both these issues: the nature of partnerships, and criminal intent. (R. 133, 134–135, 140–141.) In other words, the jury necessarily found that petitioner had never intended to form a valid partnership and that he had wilfully intended to evade the payment of his income taxes by reporting only a portion of the partnership income. According to the petitioner,[9] the formation of a nominal partnership would prevent a jury from ever convicting a taxpayer, even though the purpose of the partnership form was

[9] "Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that *there is no basis on which a jury could properly convict him* of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue." (Emphasis supplied.) (Pet. 29–30.)

for the very purpose of evading taxes. It seems quite obvious that tax evaders cannot be afforded such a ready device to avoid criminal penalties.

5. Petitioner contends (Pet. 3, 17, 31–34) that the trial court erred in denying his motions under Rules 16 and 17 of the Federal Rules of Criminal Procedure. An attempt is made to raise questions involving the scope of these rules in the light of this Court's decision in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214. In reality, however, petitioner's argument simply is that the rulings constitute an abuse of discretion. The language of the rules specifically reposes a large measure of discretion in the trial court. The facts have been set forth at some length in the Statement (*supra,* pp. 10–15), and we think they furnish ample justification for the denial of the motions.

At least as early as April 8, 1948, when his attorney refused to let him be interviewed by the agents, petitioner knew that criminal proceedings were a possibility. On July 11, 1949, his accountant, Semenza, was allowed by the agents to take all the records he wished. A second accountant, Friedman, was hired in March, 1950, for the specific purpose of looking into the criminal aspects of the case; he obtained the records Semenza had; he was allowed to examine all other records still in the Government's hands; and he remained in the case until November, 1950. Peti-

tioner was indicted on April 9, 1951, and trial was set for November 7. In June, defense counsel were told to apply to the court if they could not get information they wanted from the Government. (R. 194.) Not until October 22 did they ask to see the records held by the Government. Although the conditions attached to the reply could easily have been complied with, on November 14 [10] petitioner filed a motion to inspect, coupled with a request for a four-month continuance to enable him to examine and collate the records. On November 27, the day before the trial, he presented a motion to produce the records.[11] The trial court denied both motions on the ground that Friedman had had ample opportunity to inspect the records and, under the circumstances, a request at this late date was unreasonable. (R. 194–198, 286–288.) As the *Bowman Dairy* case points out, the object of Rules 16 and 17 is to *expedite* trials. 341 U. S. at 220. Clearly, the trial judge was exercising his discretion in a reasonable manner.

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[10] The trial had meanwhile been postponed to November 28 because of the congestion of the court's calendar. (R. 180, 264.)

[11] The Court of Appeals pointed out that petitioner had had ample prior opportunity to examine the records. The petition states (Pet. 32) that this was in connection with his civil liability, obviously referring to Semenza's examination in 1949. But Friedman's examination was in 1950, after petitioner had been officially told that criminal proceedings were contemplated, and Friedman was specifically retained to look into the criminal aspect.

There is no conflict with decisions cited by petitioner. The *Bowman Dairy* case involved the scope of the rules, *i. e.*, the types of documents to which they apply. The same is true of *Fryer* v. *United States* (C. A. D. C.), decided July 7, 1953.[12] *Gordon* v. *United States,* 344 U. S. 414, involved a motion to produce a specific document made during the trial. Whenever petitioner made such a request for specific documents during this trial, there was immediate compliance (*supra,* p. 15), and, as the trial court pointed out at the end of the trial, petitioner certainly would have known if any essential record was still in the Government's possession. (R. 3470–3474.) At no time in the Court of Appeals, or in the present petition, has petitioner been able to show that the rulings on these motions were prejudicial.

6. Petitioner contends (Pet. 3–4, 17, 34–37) that it was error to deny his motion for a new trial or for a hearing to determine whether there had been a prejudicial outside contact with a juror during the trial. There is no basis for this contention.

In the first place, although petitioner states (Pet. 34) that his "affidavit was filed promptly upon learning of the incident after the jury had returned its verdict," the verdict was actually returned on February 22; the affidavit states that

[12] A petition for a writ of certiorari has been filed by the United States. *United States* v. *Fryer*, No. 311, this Term.

the facts were discovered on February 23; yet the affidavit and the motion were not filed until February 29. Petitioner complains (Pet. 34) that the only thing in the record on the juror incident is his own affidavit "calling to the attention of the District Court the stories which had appeared *in two newspapers.*" (Emphasis added.) But petitioner fails to explain why, with six days at his disposal, he furnished no affidavits from persons who might have had knowledge of the alleged incident, or why he was content to rest his motion on two newspaper clippings, or, indeed, why he failed to avail himself of the opportunity in the District Court to argue the matter orally. (R. 93–94.) These facts alone warranted the District Court, in its discretion, to deny the motion on the grounds that petitioner had not shown the requisite prejudice.

Moreover, as the Court of Appeals held, the allegations of the affidavit and the motion were insufficient to show that there had in fact been the necessary outside contact with a juror. Thus, assuming that outside contact with a juror is presumptively prejudicial, there must be at least a prima facie showing that there was such a contact in order to warrant a hearing. As the court below stated (R. 3777):

> Appellant relied solely upon the affidavit of defense counsel stating what counsel had learned through the newspapers. If any jurors had received communications from

> the trial court or the Federal Bureau of Investigation of a nature which would tend to prejudice them against appellant, or had been subjected to other extraneous influences, such fact could have been appropriately presented by submitting affidavits of the jurors themselves.

Where petitioner, with six days to obtain affidavits to make such a showing, based his request on two newspaper clippings and chose not to argue the question in open court, it seems quite clear that the District Court did not abuse its discretion in denying the motion.

CONCLUSION

The points raised by the petition are largely factual. They have been determined adversely to petitioner by the jury, the trial court, and the unanimous Court of Appeals. No question of general importance is presented and no further review by this Court is required. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
Special Assistants to the Attorney General.

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